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SUPREME COURT, U. S.

Nos.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 693

GENERAL MILLS, INC., HARRIS MILLING CO., KELLOGG CO., NATIONAL BISCUIT CO., THE QUAKER OATS CO., BURRUS MILLS, INC., PEAVEY CO., BUHLER MILLS, INC., INTERNATIONAL MILLING CO., THE PILLSBURY CO., NEBRASKA CONSOLIDATED MILLS CO., ARCHER-DANIELS-MIDLAND CO., SHAWNEE MILLING CO., MAUSER MILL CO., THE ABILENE FLOUR MILLS CO., TENNANT & HOYT CO., AND DIXIE-PORTLAND FLOUR MILLS, INC., *Petitioners,*

v.

ORVILLE L. FREEMAN AND COMMODITY CREDIT CORPORATION, *Respondents.*

No.

NATIONAL BISCUIT COMPANY AND THE QUAKER OATS COMPANY, *Petitioners,*

v.

ORVILLE L. FREEMAN AND COMMODITY CREDIT CORPORATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above

two cases on July 18, 1966. The Morrison Milling Company is today filing a petition for certiorari in the first case (the *"Morrison"* case). The certified record filed by petitioner The Morrison Milling Company constitutes the record for both the *Morrison* case and the second case (the *"National Biscuit"* case) as well. For purposes of this petition, the two cases present substantially identical legal issues, as explained *infra* pp. 12-14.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, pp. 1a-9a) is not yet officially reported. The Memorandum Opinion of the United States District Court for the District of Columbia is printed at R. 93-99.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1966 (Appendix A, p. 10a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Persons engaged in the processing of wheat into human food products are required, prior to marketing or removing such food product for sale or consumption, to purchase from the Commodity Credit Corporation (the "CCC") "domestic marketing certificates" in an amount "equivalent to the number of bushels of wheat contained in such product." 7 U.S.C. § 1379d (b) (1964).

Regulations issued by the Secretary of Agriculture

[1] "R." refers to the Joint Appendix in the United States Court of Appeals for the District of Columbia Circuit, nine additional copies of which are being filed with this Court by petitioner The Morrison Milling Company.

(the "Secretary"), however, require wheat food processors to acquire such marketing certificates in an amount "equivalent to the number of bushels of wheat used in processing the food products," 7 C.F.R. § 777.11(a), and thus impose marketing certificate liability not only upon the "wheat contained in" food products to be sold and consumed, but also upon foreign substances and unsuitable wheat kernels separated from the usable wheat before processing, moisture which evaporates from the wheat during storage and processing, wheat lost in handling, storage and processing, and approximately 28 per cent of the wheat subjected to the flour milling process, which is removed and separated in the course of milling and disposed of for animal feed, waste or other non-food use.

The question presented is whether the Secretary's regulations are invalid because they are inconsistent with the controlling statute and arbitrary and capricious in that (i) they require processors to acquire marketing certificates for wheat and non-wheat matter not contained in food products, because removed or lost before or during processing, and (ii), even accepting the Secretary's "wheat used in processing" measure of liability, the regulations nevertheless subject processors to liability for wheat and non-wheat matter removed or lost prior to processing.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Agricultural Adjustment Act of 1938, 52 Stat. 31, 7 U.S.C. §§ 1281 *et seq.*, (1964), as amended by the Food and Agriculture Act of 1962, 76 Stat. 605, and as further amended by the Agricultural Act of 1964, 78 Stat. 173, are, first, 7

U.S.C. § 1379d(b) (1964), which provides that as to the 1964 and the 1965 wheat crop marketing years,[2]

> "(i) [A]ll persons engaged in the processing of wheat into food products shall, *prior to marketing any such food product* or removing such food product for sale or consumption, acquire domestic marketing certificates *equivalent to the number of bushels of wheat contained in such product* and (ii) all persons exporting wheat shall, prior to such export, acquire export marketing certificates equivalent to the number of bushels so exported. . . ." (Emphasis supplied.)

The second provision, 7 U.S.C. § 1379f (1964), provides that the marketing-certificate liability of wheat processors is to be based upon "wheat contained in" food products which have been processed and are ready to be sold and consumed:

> "The Secretary shall establish conversion factors which shall be used to determine the amount of *wheat contained in any food product.* The conversion factor for any such food product shall be determined upon the basis of the weight of *wheat used in the manufacture of such product.*" (Emphasis supplied.)

The particular provision of the Secretary's regulations around which this controversy revolves is found in 7 C.F.R. § 777.11(a). It provides that:

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[2] A wheat crop marketing year is, by statute, the period from July 1 of the designated year through June 30 of the ensuing year. 7 U.S.C. § 1301b(7) (1964). This case involves certificate liability imposed for the 1964 and 1965 crop years. Substantially the same program for the 1966 through 1969 crop years was provided for by the Food and Agriculture Act of 1965, 79 Stat. 1187

"Food processors shall acquire certificates and surrender certificates to CCC as provided in paragraphs (b) and (c) of this section and in the manner specified in § 777.10. The number of certificates acquired by the food processor and surrendered to CCC shall be *equivalent to the number of bushels of wheat used in processing the food products* for which certificates must be acquired and surrendered. Such quantity of wheat shall be determined and reported to CCC as provided in §§ 777.12 to 777.14 on the basis of the weight of wheat used in processing the food products or by application of conversion factors to the weight of food products obtained in the processing operation." (Emphasis supplied.)

STATEMENT

This controversy concerns the effort by the Secretary to impose upon wheat processors a measure of "domestic marketing certificate" liability far greater than called for by the governing statute, which imposes certificate liability only for "wheat contained in" food products.

While the controversy is narrow in scope, its understanding will be aided by a general outline of the legislation for the wheat program.

Prior to the 1964 and 1965 wheat crop marketing years, there was no requirement that processors of wheat food products secure certificates or otherwise make payments or meet any other conditions in order to market such products. There had been in effect only a wheat price support program for growers, pursued for many years. This program was administered under the provisions of the Agricultural Act of 1949, 63 Stat. 1051, 7 U.S.C. §§ 1421 *et seq.* (1964).

Under that program, which is still in effect with certain modifications, price support is available only to wheat growers who keep their planted acreage within an allotment determined by the Secretary. Price support is accomplished by so-called CCC loans to such growers, the loans being secured by the grower's wheat. If market prices fall below the "loan rate" used by the Secretary, the grower may "default" on his loan and, if he does so, is relieved of any obligation thereon, except that the CCC acquires title to the wheat by which the loan was "secured."

In the operation of this price support program the CCC had acquired, by 1960, huge stocks of wheat entailing a large investment of government funds and substantial storage charges.[3] Moreover, such wheat often had to be sold by CCC at prices less than the "loans" originally made the the growers.

The net cost of all this had to be met, ultimately, from general appropriations to the CCC—in other words, from the general taxpayer.

Mounting surpluses of wheat in the hands of the CCC gave Congress great concern. This led it to adopt amendments to the wheat subsidy program intended to accomplish—in the main—two things: a reduction in wheat production and a raising of some revenue by the CCC from food processors. This, it was hoped, would result in reducing surpluses and, in addition, would shift from the general taxpayer to food processors a significant portion of the burden of meeting the CCC's costs.

Legislation to that end was first adopted by the Food

[3] As of June 30, 1960, the CCC had on hand 1.195 billion bushels of wheat valued at $2.45 billion. Hearings before the Senate Committee on Appropriations on H.J. Res. 234, 89th Cong., 1st Sess., p. 39 (1965).

and Agriculture Act of 1962. These amendments were to take effect with the 1964 wheat crop marketing year. But its effectiveness was made contingent upon approval by a two-thirds majority in a wheat growers' referendum. Such a referendum was held in May 1963 and the program failed of adoption.

Thereafter Congress considered the problem further and ultimately additional amendments were enacted in the Agricultural Act of 1964. That legislation eliminated the required referendum approval of the program provided for in the 1962 law and made certain other amendments in the 1962 provisions.

The law, as amended by the Agricultural Act of 1964, laid down the following program for the 1964 and 1965 wheat crop marketing years.

Price support continued, generally speaking as in the past, but with the very important difference that the "loan rates" were set by the Secretary at a much lower level. The allotment for each farm—the number of acres planted to wheat—was reduced. This, it was hoped, would ultimately lead to a reduction of wheat surpluses. A wheat grower who agreed to stay within this reduced allotment was eligible for price support. And, if he further agreed to devote the acreage by which he has reduced his wheat planting to certain conservation uses specified by the Secretary, he was eligible for an additional benefit in the form of a certificate for each bushel of a portion of the grower's estimated crop from the acreage he was to plant. That portion was determined by the Secretary for each crop marketing year; for the 1964 year he determined that it should be 90 per cent of the estimated crop.

These certificates entitled the grower to payment of a cash benefit from the CCC. The amount of the bene-

fit per certificate was determined by the Secretary. The aim was to provide the grower, from the reduced level of price support plus the cash payment pursuant to the certificates, with a total amount that would achieve the Congressional objective as to a grower's income.

The certificates for such a grower were determined by an advance estimate based on the grower's normal rate of yield from his planted acreage; the estimate was made long prior to harvest. An unusually high actual yield would not increase the certificates for the grower. But by the same token an unusually low yield —or even no yield at all—due to drought or other hazard would not reduce the certificates for the grower.

Thus, for the grower who agreed to the restricted acreage and diversion to conservation uses, the certificates not only produced cash benefits that provided income in addition to that provided by the new (and lower) price support level but also furnished, in effect, a substantial measure of wheat crop insurance.

The certificates issued to such growers were of two sorts, domestic certificates and export certificates. A different monetary benefit was fixed for each type by the Secretary, and a new determination of the amount of that benefit was made by the Secretary for each crop marketing year. For 1964 the Secretary fixed 70 cents for the domestic certificate and 25 cents for the export certificate. The Secretary prescribed what proportion of a grower's certificates were to be export certificates; the upper limit of this proportion reflected the portion of the nation's total wheat crop that was likely to be exported, but the Secretary had wide discretion to vary the proportion.

In most instances the growers simply received a check from the CCC for the amount of the certificate payment, the "issuance" of certificates being a fiction.

While in detail the Act's provisions as to growers are extremely complicated, the basic pattern is fairly simple. The Secretary provides for price support to eligible growers at a considerably lower level than under previous programs as he deems appropriate; but for those growers who will voluntarily agree to a prescribed diversion of acreage to certain conservation uses he is empowered, through the largely (if not entirely) fictional certificate device and through complicated calculations based on advance estimates, to provide an additional benefit or subsidy which both enhances such growers' income and insures them, in a substantial measure, against the hazards of wheat agriculture.

None of this portion of the wheat program is questioned in any way in, or affected by the outcome of, this case.

The element of the Act that is involved here is the Act's provision for raising revenue for the CCC. That is the provision of 7 U.S.C. § 1379d(b) (1964), quoted *supra* p. 4. It requires processors of wheat food products, prior to removal of any such food product for sale or consumption or prior to its marketing, to acquire, and pay for, domestic marketing certificates for the "wheat contained in such product."

The fact that the price of a processor's certificate is the same in amount as the benefit fixed by the Secretary for the domestic certificate "issued" to a grower led the courts below to assume that there was some sort of equivalence between the number of "certificates"

issued to growers and the number of "certificates" required to be purchased by processors. The fact is that there is no such equivalence:

(1) The processor pays even if his wheat originated with a grower who did not participate in the program and therefore never had any certificate payments at all (which for the 1964 crop year amounted to some 25 per cent of all the wheat production).

(2) The processor pays even if his wheat originated from that portion of the participating grower's crop that exceeded normal yield, for which no certificate payments were made to the grower.

(3) The processor pays even if his wheat originated from that portion of a participating grower's crop that was not "certified."

(4) The processor pays even if his wheat originated from that portion of a participating grower's crop that was estimated to be for export.

(5) The processor pays even if he got his wheat from an importer from outside the United States.

Thus it is absolutely impossible under the framework of the Act for there to be any equivalence, theoretical or real, between the domestic certificates "issued" to participating growers and the certificates "bought" by food processors.

It is also to be noted that the Act does not purport to limit the financing of the CCC's wheat activities to the revenue it derives from the food processors. The levy on processors is simply a device to provide the CCC with some revenues other than appropriations from general tax funds and so to lessen the extent to which the general taxpayer will carry the burden. But neither the express terms of the Act nor anything in

its pattern suggests any particular relationship between the amounts thus to be levied on processors and the amounts to be provided from the general taxpayer.

It is under this asserted but nonexistent equivalence that the Secretary supported his transmutation of the statutory measure of processor certificate liability—"wheat contained in" food products—to the measure of certificate liability imposed by his regulations—"wheat used in processing food products." To do this the Secretary had to torture the English language so as to conclude that the following matter is "wheat contained in" a food product:

(1) Foreign substances (*e.g.*, rocks, sticks, metal scraps, etc.) and unsuitable wheat (*e.g.*, damaged and shriveled kernels) mingled with the raw matter acquired, but separated from the usable wheat before processing (R. 18-23);[4]

(2) Moisture contained in the wheat when acquired, but lost by evaporation both during storage and in processing (R. 18-25);[5]

(3) Wheat that is spilled or that clings to bins or is otherwise lost in storage, in handling or in processing (R. 22-24); and

(4) Non-food products produced during processing and disposed of for animal feed or other non-food use, and thus not part of or "contained in" the finished food products resulting from the processing (R. 23-25).

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[4] The Secretary allowed processors to exclude a limited amount of this matter from certificate liability by allowing the deduction of "dockage." It was uncontroverted that "dockage" does not take into account anything approaching all of this matter (R. 20).

[5] The Secretary allowed processors to make a limited allowance for moisture loss, but it was uncontroverted that moisture loss for particular cases would exceed his allowance (R. 22).

It is plain that none of these items are contained in the food products marketed and sold by processors.

It is equally plain that all the materials in item (1) above, and those parts of items (2) and (3) that are lost prior to processing, are not even "wheat used in processing food products." In requiring that certificates be bought on account of these materials, the Secretary goes even beyond his own regulatory declaration that certificate liability is to be measured by the weight of "wheat used in processing food products."

The *Morrison* case was initially filed by six wheat processors individually and as a class action on behalf of the some 500 companies in the wheat processing industry in the United States, seeking a declaration that the regulations were invalid (i) because they were inconsistent with the controlling statutory provisions, including 7 U.S.C. § 1379d(b) and § 1379f; and (ii) because they were arbitrary, discriminatory and without rational basis (R. 5-11).

Jurisdiction of the United States District Court was invoked because the cause of action arises under a law relating to commerce (the Agricultural Adjustment Act of 1938, as amended in 1962 and 1964), involves an amount in controversy in excess of $10,000 (28 U.S.C. §§ 1331, 1337), is against the CCC (15 U.S.C. § 714b) and seeks judicial review of final agency action for which there is no other adequate remedy (5 U.S.C. § 1009). Additional processors subsequently requested, and were granted, leave to intervene (R. 81-92).

The companion *National Biscuit* case was likewise filed individually and as a class action. Jurisdiction was invoked on the same grounds as in the *Morrison* case (R. 104-05).

The cases came together before the District Court on cross motions for summary judgment (R. 14, 36). The District Court upheld the validity of the regulations (R. 93-99), and the Court of Appeals affirmed (Appendix A, pp. 1a-9a).

National Biscuit, like *Morrison*, arose out of the administration of the wheat program enacted by the Agricultural Act of 1964. The Act provided (7 U.S.C. § 1379g (1964)), that the Secretary might take action to facilitate the transition between the pre-1964 support program and the program introduced by the Act. The petitioners in *National Biscuit* are two wheat processors that had an inventory on July 1, 1964, the effective date of the new program, of wheat acquired prior to that time ("old crop wheat"), which they processed into food products after that date.

The processors of such wheat were required under the Secretary's regulations, purportedly made pursuant to the Act, to purchase "transition certificates" as they processed old-crop wheat. These were similar to the domestic processing certificates required to be purchased on wheat acquired after July 1, 1964 ("new crop wheat"), but the price of the transition certificates was quite different. The object of the "transition" provision of the statute was to correlate the price of food products made from old crop wheat, originally purchased under a different type of support program, with that of food products made from new crop wheat that would be sold in competition with them.

Count II of the Complaint in *National Biscuit* disputed the manner in which the price of the transition certificates was computed, and therefore raised issues not present in the *Morrison* case. The decision of the District Court as to Count II, however, was not con-

tested on appeal, and these issues are therefore not before the Court.

The remaining issues, those presented by Count I of the Complaint and preserved on appeal, are identical with those involved in *Morrison*. For as to the transition certificates, just as to certificates levied on processors on account of wheat from the 1964 and subsequent crops, the statute provides (7 U.S.C. § 1379d(b) (1964)) that such certificates shall be imposed on "the number of bushels of wheat contained in" food products. Just as he has in the case of new-crop wheat, the Secretary through his regulations has transformed "wheat contained in" food products into "wheat used in processing." He has, further, construed "wheat used in processing" to include (1) moisture lost by evaporation during storage and in processing, (2) the amount of wheat spoiled or otherwise lost in storage, handling or processing, and (3) wheat used for non-food products, primarily animal feed.

The sole difference between these two companion cases as they appear before the Court is that with respect to new-crop wheat, but not with respect to old-crop wheat, the Secretary imposed certificate liability on non-wheat substances, such as rocks, dirt and so on, unsuitable for processing and separated from the wheat prior to processing. While the Secretary's regulations purported to impose certificate liability for these materials on processors of old-crop wheat as well, the CCC in administering the program did not impose such liability on purchasers of transition certificates (R. 107).

REASONS FOR GRANTING THE WRIT

I

This is a case of first impression under the Agricultural Adjustment Act of 1938, as amended by the Agricultural Act of 1964. While the Act was operative only as to the 1964 and 1965 wheat crop marketing years, its subsequent amendment by the Food and Agriculture Act of 1965 has extended processor domestic marketing certificate liability, in the same statutory terms, through the 1969 crop year. 79 Stat. 1187 (1965).

Petitioner The Morrison Milling Company, in its separate petition, has ably advanced the reasons for granting a writ of certiorari.

It should be emphasized that this case involves, purely and simply, an excise tax. The tax is levied, in the words of the applicable statute, on "wheat contained in" food products. Congress chose not to impose this tax through inclusion in the Internal Revenue Code. Rather, it erected an elaborate superstructure of required "domestic marketing certificates" which a wheat processor must obtain before he may legally market his wheat food products. The record shows that marketing certificates are creatures of fiction; the processor simply pays a monthly sum to the CCC; the sum is computed under regulations promulgated by the Secretary (R. 27).

At issue in this case is whether the petitioners are to be accorded the basic protection of taxpayers—the protection of being able to look to the terms of the statute to determine the basis on which the tax will be levied—or whether the plain statutory language may be distorted by the Secretary.

For it cannot be disputed that he has distorted the

statutory measure of liability. He has substituted for the statutory phrase "wheat contained in" food products the administrative phrase "wheat used in processing food products." We have explained above (*supra* pp. 11-12) the matter which the Secretary includes in his measure of liability, which goes even beyond his own standard of "wheat used in processing food products." The inclusion of such matter results in the imposition of substantial additional liability on the petitioners.

It is plain that if an excise on "wheat contained in" food products were included in the Internal Revenue Code, the petitioners' position would prevail. The rule is clear that the subject of a tax must be specified with certainty. *United States* v. *Community TV, Inc.*, 327 F.2d 797, 800 (10th Cir. 1964). And it is one of the "settled rules of statutory construction . . . that, if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer." *Hassett* v. *Welch*, 303 U.S. 303, 314 (1938). To the same effect is *Gould* v. *Gould*, 245 U.S. 151, 153 (1917).

In order to avoid this well-established rule of statutory construction, the Court of Appeals was forced to accept the Secretary's argument that form prevails over substance in determining whether the statute is to be considered a taxing measure. Here is what the Court of Appeals said:

> "[T]he purpose of the statute appears to be to regulate the price of wheat for the benefit of the grower, and the federal power relied upon is the Commerce Clause. The bill was not handled in either chamber as a tax; and the revenue raised is for the achievement of a regulatory purpose and not to contribute to the general funds of the

Treasury. Even if considered as a taxing measure, it is unlikely that Congress would fix a 50¢ rate to support a 70¢ outlay." Appendix A, p. 7a, n.3.

The court's reasoning simply will not bear analysis. First, the assertion that the purpose of the statute is to regulate and not to tax overlooks the fact that the statute serves two purposes. It is no less a taxing measure because in other sections it regulates wheat growers. The impact of the domestic certificate levy on the processor and the consequences to the Treasury are not one whit different from what they would be had the certificate levy been denominated an excise tax. The fact that the receipts from the certificate collections of the CCC do not go into general Treasury funds makes no difference. It is clear that the processor certificate tax was proposed to supplant the burden on general revenues caused by prior wheat programs. See p. 6, *supra*.

Principles of statutory interpretation should not turn on so capricious a consideration as the use of the word "certificate" instead of "tax."[6] The criteria applied to the interpretation of tax statutes are applied to tariff laws even though their primary purpose is

[6] The reason why Congress chose to levy on wheat processors through the required acquisition of fictional marketing certificates, rather than through an excise tax denominated as such, is not hard to discover. In 1933 Congress passed the Agricultural Adjustment Act of 1933, providing in part for the levy of a so-called processing tax, 48 Stat. 35 (1933), 7 U.S.C. § 609 (1964). The tax was levied on the processing of specified agricultural commodities, including wheat. That tax was struck down as unconstitutional in United States v. Butler, 297 U.S. 1 (1936). It was at least partly the question of the continuing validity of the *Butler* case that led Congress, when next it chose to raise government funds through a special levy on processors, to avoid the language of taxation. Cf. Hearings Before the Subcommittee on Wheat of the House Committee on Agriculture, ser. HH., pt. 2, p. 204 (1964). An ingenious substitute—the marketing certificate requirement—was developed.

to protect domestic industry rather than to raise revenue. See, *e.g., Erskine* v. *United States,* 84 F.2d 690, 691 (9th Cir. 1936); *Dessy Enterprises* v. *United States,* 162 F. Supp. 947, 951 (Cus. Ct. 1958); *Walling* v. *Cohen,* 140 F.2d 453, 456-57 (3d Cir. 1944). *A fortiori* such principles should govern interpretation of the provision for the certificate levy. For the so-called domestic certificate "sold" by CCC to the processor regulates nothing. It merely raises revenue.

Nor does the fact that the bill was handled in Congress by the committees concerned with agriculture make the certificate levy any less a tax. That the levy was, in practical effect, an excise tax was readily apparent to Congress; indeed for that very reason the House of Representatives seriously considered whether its rules required that the measure be referred to its Ways and Means Committee, in addition to its Agriculture Committee. 110 Cong. Rec. 7309 ff. (April 8, 1964).

Virtually explicitly, moreover, the Senate Agriculture Committee in 1964 recognized that the domestic certificate levy on processors was indeed a revenue measure. In 1964 the very section imposing the certificate levy was amended to provided that, in the case of *exports* of wheat and wheat flour, the CCC could *refund* part or all the export certificate levy. This amendment was explained by the Committee as follows: "Since the purpose of requiring certificates on wheat and wheat products *exported* is *not to obtain revenue,* but solely to regulate the price at which such products are *exported* and eliminate the possibility of windfall profits," refunds were provided for. Sen. Rep. No. 874, 88th Cong., 2d Sess., p. 33 (1964). (Emphasis supplied.) There could hardly be a clearer recognition

that the purpose of requiring certificates on *non-exported* wheat was "to obtain revenue." Indeed such a requirement could not possibly have any other purpose.

Finally, the Court of Appeals said that "it is unlikely that Congress would fix a 50¢ rate to support a 70¢ outlay." If by that the court meant to imply that the measure of processor certificate liability adopted by the Secretary results in some equivalence between domestic marketing certificate collections from processors and payouts to growers, the court was mistaken. For the measure of liability adopted by the Secretary resulted in a CCC estimate that its profits under the domestic certificate program would be approximately $75 million for the 1964 crop year alone. *Hearings on H. J. Res. 234 Before the Senate Committee on Appropriations,* 89th Cong., 1st Sess., p. 29 (1965). As noted *supra,* pp. 9-10, the statutory framework provides absolutely no equivalence between "certificate" collections from processors and "certificate" payouts to growers. The excessive measure of liability imposed by the Secretary, and the resulting enormous profits to the Government, show that even if it were assumed that Congress did intend some sort of equivalence, the petitioners' position should nonetheless prevail.

II

In a sense, one's first encounter with these cases is bound to be misleading. The complexity of the factual and regulatory background that must be mastered before the issue appears in its full simplicity tends to obscure the fact that this issue is really very simple indeed. It is whether the phrase "wheat contained in" fully processed human food products, when used in a

statute, can be expanded by administrative fiat to include not only such wheat, but also (1) foreign substances such as rocks, sticks, dirt and rodent excrement, mixed in with the wheat when purchased by the processor but separated therefrom by him before the wheat is processed into food products; (2) moisture lost by evaporation during storage and processing; (3) wheat that is spoiled or otherwise wasted in handling, storage or processing, and is thus not contained in the processed food products; and (4) by-products other than human food.

Petitioners contend that if these are "wheat contained in" processed human food products, then the English language has lost its meaning. If there was ever a case suitable for application of the rule that when words have a plain and ordinary meaning that would be universally understood and agreed upon by ordinary people, that meaning governs the interpretation of those words in a statute, that case is this one.

This is really all there is to it. But the respondents, in purporting to apply and administer the statute, have introduced, and persuaded the court below to accept, endless complexities and ramifications in an attempt to obscure the issue and to justify their course of conduct.

Consider only the bare essentials of what the respondents have done.

First, they have said, and promulgated in regulations, that "wheat contained in" food products really means, not what it says, but rather "wheat used in processing the food products." The statutory term plainly means nothing of the kind. "Wheat contained in" food products means the wheat that is present when processing has been completed. "Wheat used in processing" means, on the other hand, the wheat present at

the outset of processing. Since there is much less wheat present at the latter stage than at the earlier stage, which term is used makes quite a difference.

But "wheat used in processing" has at least this in common with "wheat contained in" food products: both are wheat. In their second step, respondents discarded this final link with the statute by announcing that "wheat used in processing" includes rocks, dirt, rodent excrement and other like substances that happen to be mixed in with the wheat when acquired by the processor. Neither are these substances wheat nor are they used in processing. They are carefully separated out from the wheat before the processing begins. Still, less, of course, are they "wheat contained in" human food products.

At the end of this second step, however, the respondents found that they had done too much. They had decided to allow the processors to deduct from the weight on which certificate liability was to be assessed some, but not all, of the rocks, dirt and so on that by the first two steps had been brought within the statutory definition. They therefore allowed the processors to deduct percentage allowances that included some, but not all, of the foreign substances and other improper additions to the "wheat contained in" food products.

Thus the respondents' final position, under which they have administered and are administering the statute, is that, for example, of two rocks present along with wheat as bought by the processor, and separated out by the same operation and at the same time prior to processing, one rock is both "wheat contained in" food products and "wheat used in processing," but the other rock is neither. Respondents have yet to suggest any conceivable theory on which this arbitrary distinction can be justified in terms of the statute.

The real significance of this third step, it is submitted, is to show that respondents had a justifiable skepticism about the validity, let alone the fairness, of their first two steps. None of the three, we submit, has the slightest warrant in the governing statute.

Fourthly and finally, when confronted with another provision of the same Act that demonstrates beyond peradventure that all their first three steps were wrong, respondents simply turned that section upside down and applied it as though it meant the opposite of what it says. The section in question, 7 U.S.C. § 1379f, reads as follows:

> "The Secretary shall establish conversion factors which shall be used to determine the *amount of wheat contained in any food product.* The conversion factor for any such food product shall be determined upon the basis of the *weight of wheat used in the manufacture of such product.*" (Emphasis supplied.)

The respondents have administered this section as though it read:

> "The Secretary shall establish conversion factors which shall be used to determine the *amount of wheat used in the manufacture of any food product.* The conversion factor for any such food product shall be determined upon the basis of the *weight of wheat contained in such food product.*"

It is respectfully suggested that any pattern of statutory construction and administration that involves the four steps outlined above must be wrong.

CONCLUSION

The writ of certiorari should be issued.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,794

THE MORRISON MILLING COMPANY, et al., *Appellants*,

v.

ORVILLE L. FREEMAN, et al., *Appellees*

No. 19,795

NATIONAL BISCUIT COMPANY, and
THE QUAKER OATS COMPANY, *Appellants*,

v.

ORVILLE L. FREEMAN and
COMMODITY CREDIT CORPORATION, *Appellees*

Appeals from the United States District Court for the District of Columbia

Decided July 18, 1966

Before BAZELON, *Chief Judge*, DANAHER and MCGOWAN, *Circuit Judges*.

MCGOWAN, *Circuit Judge*: These appeals from the District Court involve an attack by a number of wheat processors upon regulations issued and observed by the Secretary of Agriculture under the Agricultural Act of 1964. 78 Stat. 177, as amended, 7 U.S.C. §§ 1301 *et seq.* The regulations are asserted to be in direct conflict with the statute and, in any event, arbitrary and capricious. These claims were unavailing in the District Court which, on cross-

motions for summary judgment, granted that relief to appellees. The issues raised before us relate solely to the merits; and, for the reasons appearing hereinafter, we affirm the District Court.

I

The controversy is a consequence of a change by Congress in the method of providing financial support for the American wheat grower. Immediately prior to July 1, 1964—the effective date of the statute here in issue—the grower could count on $2.00 per bushel. This was available in the form of (1) a price support loan of $1.82 and (2) a Commodity Credit Corporation payment of 18¢. Under the new scheme, the loan level was reduced to $1.30, and a system of marketing certificates was set up. That scheme provided for an estimate by the Secretary of the national marketing quota of wheat. This included, among other things, estimates of the amount needed in the manufacture of food products for human consumption in the United States and of the amount to be exported. When the market quota was determined, the Secretary estimated the acreage required to produce it. Certificates of two kinds—domestic and export—were then issued to growers, who met the acreage allotment regulations, for that per cent of their estimated crop which corresponded with the percentages derived from the Secretary's estimates of domestic consumption and export needs. A 70¢ certificate was issued for each bushel of wheat within the grower's allocation for domestic consumption, and a 25¢ certificate for each bushel within the allocation for exporting. The cash to redeem the domestic certificates was to come in the first instance from the processor.

The critical language of the statute which controls the liability of processors for the certificates is the following, 7 U.S.C. §1379d:

> (b) During any marketing year for which a wheat marketing allocation program is in effect, (i) all persons engaged in the processing of wheat into food products shall, prior to marketing any such food product or removing such food product for sale or consumption, acquire domestic marketing certificates *equivalent to*

the number of bushels of wheat contained in such product and (ii) all persons exporting wheat shall, prior to such export, acquire export marketing certificates equivalent to the number of bushels so exported. (Emphasis supplied)

Under an express grant elsewhere in the Act, § 1379j, to prescribe "regulations governing the acquisition, disposition or handling of marketing certificates," the Secretary issued this regulation, 7 C.F.R. § 777.11 (1965):

Time and manner of acquiring and surrendering certificates.

(a) *General.* Food processors shall acquire certificates and surrender certificates to CCC as provided in paragraphs (b) and (c) of this section and in the manner specified in § 777.10. The number of certificates acquired by the food processor and surrendered to CCC shall be *equivalent to the number of bushels of wheat used in processing the food products* for which certificates must be acquired and surrendered. Such quantity of wheat shall be determined and reported to CCC as provided in §§ 777.12 to 777.14 on the basis of the weight of wheat used in processing the food products or by application of conversion factors to the weight of food products obtained in the processing operation. (Emphasis supplied).

It is the juxtaposition of the underlined words in statute and regulation which frames the principal problem presented in this litigation. Appellants urge that the number of bushels of wheat "contained" in a sack of white flour is not the same as the number of bushels "used" in making it. This results primarily from the fact that roughly 18 percent of the components of a kernel of wheat are made up of so-called bran and germ which go into by-products such as animal feeds. There is the further circumstance that a bushel of wheat as delivered to the miller customarily contains impurities and defective kernels which must be screened out, and moisture which is lost both while awaiting processing and in the course of processing itself.

Appellants attack the formula established by the Secretary for computing the amount of wheat for which the processors must buy certificates. The argument to us is, first, that the statute admits of nothing other than the requirement that the processor buy only as many certificates as there are bushels of wheat physically incorporated in the finished flour; and, second, that, even if bran and germ be not eliminated from this computation, the regulations have unreasonably and arbitrarily limited the permissible deduction for impurities and shrinkage. We deal with these issues in turn.

II

Appellants insist that the statutory language is so clear as to bar resort to external aids to interpretation. See *United States* v. *Missouri Pac. R. Co.*, 278 U.S. 269 (1929), and our own statement of this proposition in *Elm City Broadcasting Corp.* v. *United States*, 98 U.S.App.D.C. 314, 319, 235 F. 2d 811, 816 (1956). But this is a doctrine which reflects a highly optimistic view of the human capacity to communicate precise meaning by the written word. There are surely occasions where its invocation is justified, particularly where a covert look may indicate that the appeal from one set of words to another is not very illuminating. It is rare indeed, however, that particular words patently preclude all but one meaning; and courts should be slow to spurn such enlightenment as may be available from any authentic source.

We do not believe that the statutory reference to bushels of wheat "contained in" flour in this context is as clear in its signification as appellants assert. It is not wholly idle to believe that perhaps Congress might have been thinking in terms of bushels of wheat "used in" making flour, as the regulation assumes. It would not be a bizarre employment of ordinary speech for a housewife to say that three quarts of cherries were "contained in" her jam, although, when cross-examined about the stems and the pits and so on, she might readily agree that she had in reality "used in" making the jam three quarts of cherries. We think that, contrary to appellants' claim, an ambiguity lurks in this statute

which authorizes us to look beyond its four corners for help in resolving this substantial dispute about its meaning.

Our first look, however, is not outside the Act of which Section 1379d(b) is a part. Domestic marketing certificates are provided for in Section 1379c. The Secretary is directed to arrange "for the issuance of domestic marketing certificates for the portion of wheat marketing allocation representing wheat *used* for food products . . ." (Emphasis supplied). The Secretary is also directed to fix as the value of domestic marketing certificates, the difference between the support level of certificate wheat and the support level of non-certificate wheat. These respective levels as set by the Secretary were $2.00 and $1.30, respectively, leaving the value of a certificate, as defined in the statute, at 70¢.[1]

The scheme of the statute is that the Secretary was to estimate in advance how many bushels of the annual crop would go into domestic processing. A certificate was to be issued in respect of each bushel in this estimate. A processor must acquire a certificate for each bushel bought by him for processing. The producer of that bushel was paid 70¢ by the Government. If the Government was not to be out of pocket, the processor must pay 70¢ for the certificate.

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[1] The phrases "wheat contained in" and "wheat used in" appear in Section 1379f of the Act; and appellants vigorously maintain that their usage in that context confirms the interpretation claimed for them in §1379d. Section 1379f is concerned with the establishment of conversion factors. It is said that the Secretary, by working back from the weight of the flour to the weight of the wheat required for its manufacture, has violated the command of Congress to do just the opposite; and that this command itself demonstrates Congress's purpose to require certificates only in respect of the residue of wheat physically present in the flour. To adopt the Secretary's interpretation of "contained in," it is further asserted, would render the Section nonsensical. There is evidence, however, that this statute was enacted against the background of conversion factors devised in accordance with the Secretary's approach; and, in the light of this fact, the phrasing of § 1379f may be reasonably read as the Government contends.

The District Court was of the view that Congress had been thinking in terms of a rough equivalence between what had to be paid out to the farmers in respect of the certificates, and what would be received from the processors for the certificates. We agree. The Congressional plan seems to us to be preoccupied with bushels of wheat moving from farm to market, and not with residues after processing. Congress was at the old stand of assuring farm income and, as always, it was concerned with the source of the support payments. It obviously thought to make the processors a revenue source, and the contribution it expected from them was 70¢ per bushel, not 50¢ as it would be under appellants' theory. This is explicit in many exchanges on the floor in both Senate and House;[2] and it is unmistakable from the Senate Committee report on the 1964 legislation. 1964 U.S. CODE CONG. & AD. NEWS 2142. Characterizing the effect of the proposed legislation as being "to require a certificate

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[2] Typical is the following colloquy between the floor manager of the bill, Senator McGovern, and Senator Morton:

"MR. MCGOVERN. The price of wheat to the miller would tend to be held at approximately $2. It would not change the present price level at all. This bill is designed to prevent the price of wheat from dropping, not to raise it.

MR. MORTON. But if someone wanted to buy 1,000 bushels of wheat, he would have to have 1,000 70-cent certificates.

MR. MCGOVERN. Yes.

* * *

MR. MORTON. Milling wheat at Chicago today is approximately $2, is it not?

MR. MCGOVERN. That is approximately right.

MR. MORTON. So after the bill was passed, the purchaser would still have to pay $2 plus the 70-cent certificate?

MR. MCGOVERN. No. The support rate is set today at different levels than it would be in the absence of this bill. What it will be under the bill if passed is a price of $1.30 plus the 70-cent certificate. Today the total of price support and other assistance comes to $2. So we are not changing the price of wheat 1 cent a bushel under the legislation before us."

110 CONG. REC. 4169 (1964).

on all wheat processed into such (food) products . . .," the Committee also said:

> "Wheat for domestic food use, however, would be priced at about $2, including the value of the certificate. This is the level it has been moving at in recent years and the bill would not result in any increase in the price of wheat to flour millers and should therefore by itself have no effect whatsoever on the price paid for bread by consumers." *Ibid.*

This legislative record, in our view, ineluctably leads to a firm impression that all persons interested in the legislation, including the millers themselves, were under no misapprehension that, if enacted, one buying a bushel of wheat from a farmer to make flour would have to pay 70¢ for a certificate.[3]

Even without this explicit evidence of Congressional purpose, we would, of course, be slow to reject the Secretary's own reading of a statute which Congress has given him the duty to administer. Administrators are not always right in their divinations of the legislative will, but anyone who is at all familiar with the closeness of the relationship between executive departments and Congress during the consideration by the latter of a change in a major statute administered by the former, knows that their guesses are far from uninformed. In any event, the courts have accorded them a special respect. *FTC* v. *Mandel Brothers,*

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[3] Appellants argue that, even if some ambiguity in the statute be conceded, the result should still be the same inasmuch as the law is clearly a taxing measure and is, therefore, to be construed most strongly against the Government. See *Gould* v. *Gould*, 245 U.S. 151 (1917). But the purpose of the statute appears to be to regulate the price of wheat for the benefit of the grower, and the federal power relied upon is the Commerce Clause. The bill was not handled in either chamber as a tax; and the revenue raised is for the achievement of a regulatory purpose and not to contribute to the general funds of the Treasury. Even if considered as a taxing measure, it is unlikely that Congress would fix a 50¢ rate to support a 70¢ outlay.

Inc., 359 U.S. 385 (1959); *Power Reactor Development Co.* v. *International Union*, 367 U.S. 396 (1961); and see especially Judge Prettyman's comment on this matter in *California Company* v. *Udall*, 111 U.S.App.D.C. 262, 266, 296 F. 2d 384, 388 (1961).

III

The regulations issued by the Secretary provided alternative methods for determining the quantity of wheat used in processing. One was on the basis of the weight of the wheat used, and the other by the application of conversion factors to the weight of the resulting food products. In the case of the former, the regulations further provided for a deduction of (1) dockage, (2) shrinkage from drying up to 0.6% and (3) wastage. It is alleged that these allowances account for some—but not all—of the transformation which occurs in a bushel of wheat processed into a food product.

Appellants appear to argue that, even if their reading of the statute be wrong, thereby accepting the propriety of including the bran and germ components in the weight for certificate purposes, the Secretary has acted arbitrarily and capriciously in limiting the deductions for these other elements. This is a point which does not seem to be discussed by the District Court in its memorandum opinion, and which was urged somewhat obscurely upon us in brief and argument, perhaps because of the overriding importance of the statutory argument. Indeed, the claim of arbitrariness in this regard in reality stems ultimately from appellants' view of the statute, *i.e.*, that only the residue physically present in the finished product may be made the basis of certificate computation.

Taking it, however, as a separate and independent contention, we are not prepared to say that the regulations are invalid. Dockage is a trade term describing impurities. A sample of wheat about to be sold is sieved, and the percentage of dockage in the sample is deducted from the whole. It is not pretended that this test picks up all the foreign matter, but the remaining sample is then graded in a manner which takes this into account. Price goes according to grade. Thus, the regulations allow the usual weight deduction, leaving other impurities to be reflected in price.

Shrinkage from loss of moisture occurs both during storage and in the course of processing. But processing loss is the very nub of the dispute between the parties over the proper reading of the statute; and, once that dispute is resolved in favor of the Secretary, a regulation which makes no allowance for processing loss would be neither arbitrary nor capricious. Appellants, presumably because of their view of the statute, persistently lump the two types of moisture loss together in their argument that the allowance is inadequate, and have made no attempt to differentiate between the two kinds of losses. Thus, the Secretary's contention as to normal shrinkage losses during storage is largely unchallenged, because appellants are proceeding on a different set of assumptions—assumptions which we have rejected in our treatment of the statutory construction argument. In any event, the record does not enable us to say with confidence that the Secretary's allowance by regulation of 0.6 percent for moisture loss is unreasonable.[4]

With respect to wastage, it appears to be undisputed in the record that the regulations do not require marketing certificates in respect of wheat which, because of some flaw in processing, fails to become a food product removed from the plant or marketed as such. And insofar as this claim rests upon the amount of wheat lost in handling and storage, this loss does not appear to be either of such a magnitude or so lacking in relationship to the processing of the wheat as to compel holding the regulations arbitrary.

The judgment of the District Court is

Affirmed.

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[4] A Government affidavit asserts that this allowance was fixed upon after consultation with industry spokesmen who advised that it "was adequate to offset any invisible loss occurring during storage in the usual course of operations." An affidavit for appellants, although stating that "trade practice recognizes no limit on moisture loss during storage," does not directly challenge the Government's contention that the allowance is based upon *normal* storage conditions.

Filed July 18, 1966, /s/ Nathan J. Paulson, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1965.

[Civil 304-65, 352-65]

No. 19,794

THE MORRISON MILLING COMPANY, ET AL., *Appellants*,

v.

ORVILLE L. FREEMAN, ET AL., *Appellees*.

No. 19,795

NATIONAL BISCUIT COMPANY AND THE QUAKER OATS COMPANY, *Appellants*,

v.

ORVILLE L. FREEMAN AND COMMODITY CREDIT CORPORATION, *Appellees*.

Appeals from the United States District Court for the District of Columbia.

Before: BAZELON, Chief Judge, and DANAHER and McGOWAN, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the judgment of the District Court appealed from in these cases is affirmed.

Per Circuit Judge McGOWAN.

Dated: July 18, 1966.